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Supreme Court, U.S.
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No. 96-1777

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

E.I. DU PONT DE NEMOURS AND COMPANY,

Petitioner,

v.

THE BUSH RANCH, INC., WILLIAM R. LAWSON, YELLOW RIVER GROWERS, ROY PHILLIP BARBER, CAROL H. BARBER, AND C. RAKER & SONS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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Respondents' "Brief in Opposition to Petition for Writ of Certiorari" only confirms the need for this Court to review this case. Respondents do not (and cannot) seriously deny the manifest circuit conflicts identified in DuPont's petition. Nor do they contest the importance of the case. Rather, they devote 18 of the 22 pages of their brief to urging the Court to grant *certiorari* on the two issues presented in their "opposition" instead of on the three issues presented in the petition. Respondents apparently hope thereby to obscure the real issues before this Court.

1. Respondents' "Brief in Opposition" Is Primarily an Improper and Untimely Cross-Petition.

Respondents' "brief in opposition" is nothing of the sort. Respondents do not oppose a grant of *certiorari* in this case. To the contrary, they *advocate* such a grant—but one limited to the issues presented in their brief in opposition rather than in the petition. That attempt to hijack the petition for their own ends violates this Court's most basic procedural rules.

A brief in opposition is not an appropriate vehicle for presenting new questions for this Court's review. If respondents wished to challenge any adverse aspects of the decision below, they were required to file a petition or cross-petition. *See, e.g., TWA v. Thurston*, 469 U.S. 111, 119 n.14 (1985); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976). They were also free, for up to thirty days after DuPont's petition was docketed, to file a conditional cross-petition. S. Ct. Rule 12.5. They chose to pursue neither of these alternatives. Instead, they sought—and received—an extension of time in which to file their brief in opposition to the petition for *certiorari*. *See* Appendix A.

A brief in opposition is not a substitute for a cross-petition. A cross-petition "may not be joined with any other pleading," S. Ct. Rule 12.5; it must be filed under its own docket number

after payment of the requisite docketing fee, *see id. See also* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 362 (7th ed. 1993) ("The cross-petition must be a separate document, not combined with the brief in opposition to certiorari."). Under no circumstances may a cross-petition be filed more than 30 days after the petition. *See* S. Ct. Rules 12.5, 13.4. Indeed, the Rules could scarcely be more explicit on this score: "The time to file a cross-petition *will not be extended.*" S. Ct. Rule 12.5 (emphasis added).

Accordingly, the bulk of respondents' "brief in opposition" is nothing but an improper and untimely attempt to file a cross-petition. The two "questions presented" in that brief seek to modify, not defend, the decision below: respondents ask this Court to (1) reverse the Eleventh Circuit's judgment reversing the district court's contempt judgment against DuPont, and (2) vacate the Eleventh Circuit's order assigning the case to a different district judge on remand. Such questions can properly be raised only in a timely petition or cross-petition. Because respondents failed to file any such document, the two questions presented in their brief in opposition are "not properly before the Court." *Union Pac. R.R.. Co. v. Sheehan*, 439 U.S. 89, 92 n.2 (1978) (*per curiam).*

In any event, respondents' two "questions presented" are wholly unworthy of this Court's review on the merits. Respondents first argue that the Eleventh Circuit erred by failing to affirm the district court's unprecedented sanctions as an appropriate exercise of unspecified "inherent powers" *distinct from* the inherent contempt powers. Opp. at 8-14. Even a moment's reflection dooms this argument. The stringent limitations on the judicial contempt powers would be rendered a dead letter if courts could simply declare that they were imposing sanctions under inherent powers *other than* contempt. The issue, at any rate, is wholly academic here, as the District Court below made it crystal clear that it *was* relying

on its inherent contempt powers. *See, e.g.*, Pet. App. at 58a ("DuPont's conduct constitutes contempt of this Court."); *id.* at 56a ("The power to punish for contempts is inherent in all courts.") (internal quotation omitted); *id.* at 57a ("Civil contempt has a remedial purpose, not the least of which is to give force and vitality to judicial decrees."). Indeed, respondents did not challenge this point below; rather, they argued that the contempt sanctions in this case were *civil*, rather than *criminal*, in nature.[1]

Respondents next argue that the Eleventh Circuit violated their constitutional rights (as well as those of the District Judge) by ordering this case assigned to a different judge on remand. Opp. at 15-17 & n.9. It goes virtually without saying, however, that neither litigants nor judges have a constitutionally protected "liberty" or "property" interest in the adjudication of a particular case by a particular judge.

2. Respondents Cannot Justify the Eleventh Circuit's Failure to Dismiss this Inherently Criminal Private Action.

Starting from the faulty premise that this case involves the exercise of *civil*, rather than *criminal*, sanctioning authority, respondents defend the Eleventh Circuit's decision to remand, rather than dismiss, the action. According to respondents, "the matter has been remanded to the District Court for the imposition of *civil* sanctions." Opp. at 8 (emphasis added). Respondents acknowledge that, if they are mistaken on this

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[1] By the same token, respondents' asserted circuit conflict is illusory. In *Carroll v. Jaques Admiralty Firm, P.C.*, 110 F.3d 290 (1997), the Fifth Circuit did not even mention the distinction between civil and criminal sanctioning powers, much less suggest that courts are free to entertain independent actions for civil contempt or to impose enormous punitive sanctions of the sort involved here without affording the procedural safeguards of the criminal law.

point, the first question presented in the petition—whether the Eleventh Circuit erred by failing to dismiss the case—does indeed merit this Court's review. *See* Opp. at 9; *cf. id.* at 2 n.1.

The existence of the circuit conflict presented by the first issue in the petition, however, does not depend on the nature and scope of the remand. It is clear, at the very least, that the Eleventh Circuit has kept this action alive in circumstances where other circuits would have ordered it dismissed. Regardless of the nature and scope of the remand, this case is on all fours with *Kienle v. Jewel Tea Co.*, 222 F.2d 98 (7th Cir. 1955). There, as here, a private party brought an independent action seeking to punish a former litigant for alleged discovery violations in a defunct case, and thereby to "vindicate" the district court's authority. In contrast to the courts below, the *Jewel Tea* court recognized that no jurisdictional basis existed for any such action. That court explained that an independent action for sanctions must be "dismissed" where the "pleading sought no remedy for [the plaintiff] through coercive punishment of [an] alleged contemnor, but, on the contrary, asked the court to vindicate its power . . . by assessing a definite punishment for criminal contempt." *Id.* at 100. Other courts, along the same lines, have recognized that there is no such thing as an independent cause of action for civil contempt. *See* Pet. at 7. Accordingly, the District Court here erred by refusing to dismiss this action for lack of jurisdiction in the first instance, and the Eleventh Circuit in turn erred by remanding the case for yet further proceedings.

In any event, respondents' assertion that the Eleventh Circuit has remanded the case for *civil* sanctions finds no support in the opinion below. To the contrary, the opinion contemplates that any potential further proceedings would be *criminal* in nature. Thus, in explaining its decision to address the sufficiency of the evidence, the Eleventh Circuit stated that "a ruling on this issue will either confirm or remove

permanently a risk of the imposition of serious *criminal contempt sanctions* against DuPont." Pet. App. at 11a (emphasis added). Only by resolving that issue against DuPont, the Court explained, could it "allow this case to proceed further." *Id.* *See also id.* at 12a (noting that the opinion should not be construed "to predetermine the outcome of *the criminal contempt proceeding*") (emphasis added). At this juncture, respondents do not have the luxury of contesting the Eleventh Circuit's conclusion that this proceeding is inherently criminal, rather than civil, in nature. Because they failed to file a cross-petition, they must take the decision below as they find it.

Respondents also err in suggesting that DuPont failed to preserve this issue below because the company "neither raised the issue in the District Court nor urged it in emergency motions to the appellate court." Opp. at 13. That suggestion is incorrect as a matter of fact and irrelevant as a matter of law. DuPont *did* argue from the outset that there was no jurisdictional basis for this independent action for sanctions. Both the District Court and the Eleventh Circuit expressly (albeit incorrectly) rejected that argument. *See, e.g.*, Pet. App. at 54a-56a, 7a. Although that alone is more than enough to preserve the issue for this Court's review, *see, e.g., Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995), it is also axiomatic that issues relating to the jurisdiction of the federal courts are not subject to waiver, *see, e.g., United States v. Hays*, 115 S. Ct. 2431, 2435 (1995).[2]

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[2] Respondents also suggest in passing that the district court's order may not be final because the court stayed that order pending appeal and never held a hearing to allocate the fines that DuPont was ordered to pay into the court registry. *See* Opp. at 7, 13 n.7. That suggestion is baseless. A stay pending appeal does not deprive the stayed order of its finality—the whole point of the stay mechanism, after all, is to *protect* the right to an orderly

(continued...)

3. Respondents Cannot Justify the Eleventh Circuit's Holding that the Specificity of a Court Order Is a Question of Fact, not Law.

With respect to the second issue presented in the petition—whether the interpretation of a court order for purposes of contempt is a question of *fact* or of *law*—respondents make no more than a token effort to deny the circuit conflict. *See* Opp. at 19. According to respondents, the Eleventh Circuit "never indicated" that the interpretation of such an order "could *not* be subject to a legal ruling and reviewed on appeal *de novo*." *Id.* (emphasis added). Nor, they conversely contend, do the cases cited by DuPont on the other side of the split "describe the standard of review as *de novo*." *Id.* Thus, respondents apparently take the position that no standard of review of any sort can be discerned from any case. Even a cursory review of the opinion below and the cases cited in the petition shows that they are wrong.

The Eleventh Circuit expressly based its decision to remand, rather than dismiss, this case on the proposition that the existence of a court order of sufficient clarity to support a contempt judgment is a question of *fact* rather than of *law*. *See* Pet. App. at 11a-12a. The court pointedly refused to decide whether any such order existed, but instead held that the issue must be decided by a finder of fact. *Id.* at 11a. Drawing upon the deferential sufficiency-of-the-evidence standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the court described the relevant inquiry as whether "there is insufficient evidence from which a reasonable finder of fact

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[2] (...continued)
appeal, not defeat it. Because the sanctions order required DuPont to pay money into the court registry and take other actions within a specified number of days, it is unquestionably an appealable final order *regardless* of how the district court might ultimately have decided to spend the money.

could conclude that there was a reasonably specific order requiring DuPont to produce the Alta data." Pet. App. at 12a. In applying that standard, the court emphasized that it was viewing the evidence, and deciding all credibility issues, in the light *most favorable* to the contempt charge, and drawing all inferences in *favor* of guilt. *Id.*

The circuit conflict created by that decision could not be more stark. As explained in the petition, *see* Pet. at 13-14 & n.2, no other circuit applies the deferential *Jackson* standard to determine the existence of a court order of sufficient clarity to justify a judgment of contempt. To the contrary, other circuits have approached the clarity of a court order as a matter of *law* subject to *de novo* review. *See id.* Even respondents concede (as they must) that the Third Circuit has expressly held that whether an order is specific enough to "'confor[m] to the legal requirements [for contempt] is a *question of law*.'" Opp. at 19 (quoting *Harris v. City of Philadelphia*, 47 F.3d 1333, 1340 n.5 (3d Cir. 1995)) (emphasis added). *See also Harris v. City of Philadelphia*, 47 F.3d 1311, 1321 n.11 (3d Cir. 1995) (characterizing specificity of court order for purposes of contempt as "a legal issue"). Many other circuits have also treated the specificity of a court order as a matter of law, *see* Pet. at 13-14 & n.2, even if they have been less explicit than the Third Circuit in articulating that point. The Eleventh Circuit's contrary approach turns the settled law of contempt on its head by construing any ambiguity in a court order *against*, rather than in *favor* of, an alleged contemnor. *See* Pet. at 11 (citing, *inter alia*, *NBA Properties, Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990) (Breyer, J.) (appellate court reviewing a contempt judgment "must read any ambiguities or omissions in . . . a court order as redounding to the benefit of the person charged with contempt.")).

4. Respondents Cannot Justify the Eleventh Circuit's Retroactive Application of the Amended Version of Fed. R. Civ. P. 26(e).

Finally, respondents assert that DuPont has "manufactured" the third issue presented in the petition—the propriety of the Eleventh Circuit's retroactive application of the 1993 amendments to Federal Rule of Civil Procedure 26(e)—by presenting a "misleadin[g]" description of the opinion below. Opp. at 21, 20. According to respondents, the Eleventh Circuit "did not at any point suggest that the violation of that Rule as amended could support a finding of criminal contempt." *Id.* at 20. Again, even cursory review of the opinion shows that they are mistaken.

The Eleventh Circuit relied on the amended version of Rule 26(e) as an essential link in the chain of reasoning underlying its conclusion that a reasonable factfinder could find DuPont guilty of violating a discovery order. The order that the Eleventh Circuit believed could be construed to require production of the disputed Alta raw data *predated* the existence of those data. *See* Pet. App. at 12a-13a. Thus, unless DuPont was subject to a duty to supplement its discovery responses, it *could not* have violated that order. The Eleventh Circuit acknowledged as much, but identified the amended version of Rule 26(e) as the source of such a duty. *See id.* at 14a n.8. That version of the Rule, however, did not take effect until December 1993—well *after* the conclusion of discovery in *Bush Ranch* (indeed, after the *Bush Ranch* litigation had been settled and dismissed with prejudice). Accordingly, the Eleventh Circuit impermissibly authorized the potential imposition of criminal liability based on the retroactive application of a new substantive duty.

Respondents attempt to deny this error by suggesting that the relevant supplementation duty arose not from the amended version of Rule 26(e), but from a March 15, 1993 order

requiring DuPont to fill in "'all gaps in documents responsive to Plaintiffs' original discovery requests.'" Opp. at 21 (quoting Order Imposing Sanctions Dated March 15, 1993, at 4). That is incorrect. As the Eleventh Circuit acknowledged, the Alta raw data were generated "a couple months *after* the district court issued its gap-filling order." Pet. App. at 17a (emphasis added). That is why the Court of Appeals was forced to rely on the amended version of Fed. R. Civ. P. 26(e) as the source of the alleged supplementation duty—there was no supplementation order in effect at the time the Alta raw data were generated, and hence no duty to produce those data. The Eleventh Circuit's retroactive imposition of such a duty violates both bedrock norms governing the retroactivity of statutes as well as the Ex Post Facto Clause.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the writ of *certiorari* should be granted. In the alternative, the decision below should be summarily reversed to the extent that the Eleventh Circuit relied upon retroactive application of the 1993 amendments to Fed. R. Civ. P. 26(e) in

determining that there could potentially be a finding of contempt in this case, and the case should be remanded for the Eleventh Circuit to reconsider whether any remand to the District Court is permissible.

Respectfully submitted,

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July 15, 1997

APPENDIX A

SUPREME COURT OF THE UNITED STATES
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May 30, 1997

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479-3011

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RE: E.I. DuPont de Nemours and Company v. Bush Ranch, Inc., et. al.
No. 96-1777

Dear Mr. Pope:

Your request of May 27, 1997 for an extension of time in which to file a response to the petition for a writ of certiorari in the above-entitled has been granted; the time has been extended to and including July 7, 1997.

Very truly yours,

WILLIAM K. SUTER, Clerk

By

Francis J. Lorson
Chief Deputy Clerk

cc: Edward W. Warren